

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between

**FRATERNAL ORDER OF POLICE,
LODGE #5**

OPINION & AWARD

AAA No. 01-15-0003-8973
(P/O Tracye Turk)

CITY OF PHILADELPHIA

ARBITRATOR: James M. Darby, Esq.

APPEARANCES: For the FOP:
Marc L. Gelman, Esq.
Jennings Sigmond, P.C.

For the City:
Lisa Swiatek, Esq.
City Solicitor's Office

This case arose on May 21, 2013, when the City of Philadelphia ("the City") Police Department ("the Department") suspended Police Officer Tracye Turk ("the Grievant") for 25 days without pay, and transferred him for unspecified conduct unbecoming an officer. The Fraternal Order of Police, Lodge #5 ("the Union") filed a grievance alleging that the City's discipline action lacked just cause.

By letter dated July 29, 2015, from the American Arbitration Association (“AAA”), the undersigned was notified of his selection as Arbitrator of this dispute. A hearing was held on April 4, 2017, at the AAA offices in Philadelphia, Pennsylvania, where the parties were afforded a full opportunity to present testimony, exhibits and arguments in support of their positions. The parties presented oral closing arguments in lieu of filing post-hearing briefs, and the record was closed. After fully considering all of the evidence and arguments presented, the matter is now ready for final disposition.

QUESTIONS TO BE RESOLVED

At the hearing, the parties stipulated to the following issue to be resolved by the Arbitrator:

Did the City have just cause to suspend and transfer the Grievant, Tracye Turk? If not, what shall the remedy be?

REMEDY REQUESTED

The Union requests that the grievance be sustained, and that the Grievant be made whole, and that the Arbitrator retain jurisdiction for purposes of resolving any remedial disputes.

FACTS

The Department hired the Grievant as a police officer in 1997. He was issued a one-day disciplinary suspension in 1998. At the time of the incidents involved herein he was assigned to the 35th District and temporarily detailed to the Philadelphia International Airport.

Based on an investigation, the Department made the following findings upon which it based a finding of conduct unbecoming against the Grievant:

In that on December 1, 2012, approximately 1:48 AM, Sergeant K [REDACTED] S [REDACTED] ... conducted a vehicle investigation in the 5700 block of North 2nd Street. Sergeant S [REDACTED] has responded to a radio call of gunshots in this area and observed a female sitting in the driver's seat of a grey 2006 Pontiac Grand Prix ... parked the wrong way at this location. Sergeant S [REDACTED] observed that female had her eyes closed and her head was slumped to the side, and he believed she could have been possibly shot or unconscious in the vehicle. As Sergeant S [REDACTED] approached the vehicle, he observed you, leaning back in the front passenger seat, with a black colored gun in a holster on your lap. Officer L [REDACTED] J [REDACTED] ... had arrived on location to back up Sergeant S [REDACTED]. Sergeant S [REDACTED] was unaware that you were an off duty Philadelphia Police Officer and drew his weapon and gave you orders to place your hands on your head. You ignored Sergeant S [REDACTED] directions several times. The female shouted that you were an off-duty officer. You were eventually taken out of the vehicle and identified yourself. You then told Sergeant S [REDACTED], 'Fuck you sergeant, you punk ass nigga. I don't have to listen to you. Fuck you bitch. You are a pussy.' Sergeant S [REDACTED] stated you further added, 'Fuck you bitch ass nigga. You ain't shit. I don't give a fuck that you are a sergeant. Nigga.' Officer J [REDACTED] witnessed your derogatory remarks. Other officers who responded to this incident also confirmed that you were speaking loudly, using profanities, and making derogatory remarks toward Sergeant S [REDACTED]

In addition to receiving a twenty-five (25) day suspension for the above violation, you were transferred from your assignment in the 35th District, to the 18th District.

(Joint Exhibit 2.)

On July 1, 1998, the Department promulgated Directive 10.8 (“the Directive”) entitled “Police Confrontations.” The Directive explains that given the numerous encounters between uniformed and plain clothes, officers “must be able to identify one another in order to ensure their safety.” It goes on to state that “[i]t must be absolutely clear in the minds of all sworn officers that in any confrontation the burden of proving identity rests with the officer being confronted, whether on or off-duty.”

In this regard, the Section 4 of the Directive provides the following steps that “confronted officers” must follow if challenged by another officer to stop and properly identify him/herself:

1. Remain motionless, even if it means losing a fleeing suspect.
2. DO NOT TURN TOWARD THE CHALLENGING OFFICER, ESPECIALLY IF HOLDING A FIREARM.
3. Obey all instructions from the challenging officer.
4. Identify yourself verbally as a police officer in your communications with the challenging officer.
5. Inform the challenging officer of the exact location of your badge and identification card.
6. Produce the identification in a slow, controlled manner without unnecessary movement.

(City Exhibit 2.)

S ██████ testified that he did not know the Grievant at the time of the December 1, 2012 incident. He stated further that after seeing the gun in the

Grievant's lap he ordered him several times to put his hands up and that the Grievant simply smiled. S [REDACTED] averred further that as the Grievant started to move his hands towards his weapon, "I was ready to shoot." Although the female in the car announced that the Grievant was a police officer, the Grievant still did not put his hands up. According to S [REDACTED], the Grievant's gun slipped off his lap onto the floor of the vehicle. S [REDACTED] retrieved it while the Grievant "said not one word." S [REDACTED] then stated to the Grievant: "If you're a cop you should know to identify yourself." At this time, the Grievant continued to smile and began to shout the obscenities at S [REDACTED] that are presented in the aforementioned charges, without presenting any identification.

S [REDACTED] testified further that the Grievant finally handed his ID to Officer J [REDACTED] who had arrived to assist S [REDACTED]. Once S [REDACTED] was on notice the Grievant was a police officer he directed him to step out of the vehicle. The Grievant continued to yell "Fuck You" and "bitch ass nigga" at S [REDACTED].

On cross-examination, S [REDACTED] testified that he remained calm and professional during his confrontation with the Grievant. He only raised his voice when the Grievant moved his hand toward his weapon. S [REDACTED] also stated that the Grievant reached his hand toward his gun, not his wallet, after S [REDACTED] asked him to put his hands up. Also, the Grievant was not asleep but had his head back and was awake. According to S [REDACTED], the Grievant acted as though he was under the influence. Even with S [REDACTED] gun pointed at him the

Grievant refused to identify himself or put his hands up. S [REDACTED] also averred that J [REDACTED] recognized the Grievant while the Grievant was still sitting in the vehicle. According to S [REDACTED], he never cursed during the confrontation. He also averred that the neighborhood where the confrontation occurred was very dangerous, with lots of guns and gang activity.

S [REDACTED] also testified that he asked the Grievant for his ID after he got out of the vehicle, but that the Grievant gave the ID to J [REDACTED]. S [REDACTED] also stated that he pulled out his asp when the Grievant “balled up his fist,” at which time S [REDACTED] directed the Grievant to place his hands on the car.

Officer J [REDACTED] testified that when he arrived to assist S [REDACTED] he encountered a “serious” situation where S [REDACTED] had his gun drawn on the Grievant. J [REDACTED] also drew his weapon, at which time he heard a female in the car yell: “He’s a cop!” S [REDACTED] continued yelling at the Grievant: “Don’t move” and directed him to verbally respond, but the Grievant remained silent. At that time the Grievant stuck his head out of the car window and J [REDACTED] recognized him as a police officer from the 35th District. J [REDACTED] told S [REDACTED] that he knew the Grievant, who still remained silent, even after S [REDACTED] reminded him of the confrontation rules. According to J [REDACTED], the Grievant began cursing at S [REDACTED] after S [REDACTED] told him to place his hands on the car and leave them there.

J [REDACTED] also testified that he saw a bottle of liquor on the floor of the car and noticed that the Grievant's eyes were glassy. He stated that the Grievant gave his ID and badge to S [REDACTED], at which time S [REDACTED] asked him to step out of the car.

On cross-examination, J [REDACTED] averred that he told S [REDACTED] several times that he worked with the Grievant. He added that the Grievant handed over his ID before he was directed to step out of his vehicle, but he never verbally identified himself. When asked why he thought S [REDACTED] asked the Grievant to place his hands on the car, J [REDACTED] stated that the neighborhood was "wild," with "lots of guns and shootings." He reiterated that the Grievant did not begin to curse until S [REDACTED] directed him to place his hands on the car. J [REDACTED] also stated that S [REDACTED] remained "calm and collected" throughout the incident.

Inspector Joseph Fredericksdorf was captain of the 35th District at the time of the incident. He testified regarding how he oversaw the investigation of the foregoing incident. After reviewing all of the interviews conducted by Lieutenant (now Captain) Gregory Riley, Fredericksdorf concluded that the Grievant "was insubordinate and used profane language directed at Sergeant S [REDACTED], including racially derogatory terms" (City Exhibit 1, p. 2). He sent his findings to the Charging Unit without making any discipline recommendations.

Captain Riley testified about his interviews of the Grievant, S [REDACTED], J [REDACTED], as well as other officers who were present when the Grievant was

verbally assaulting S████. He testified that he could not conclude that S████ actions at any time were inappropriate. Riley testified on cross-examination that he did not recommend any discipline. However, he averred that he believed that the 25-day suspension and transfer were “excessive,” and that he had never seen an officer receive such a lengthy suspension for being insubordinate. The Police Board of Inquiry (“PBI”) concluded that the Grievant violated Article 1 of the Disciplinary Code, “Conduct Unbecoming,” under the category “Unspecified” (1-§001-10). The “prescribed [discipline] limit” for such a 1st Offense is listed as “Reprimand to Dismissal.” The PBI recommended, and the Police Commissioner approved, a 25-day suspension and a transfer. (City Exhibits 2-3.)

M████ K████ testified that since the Grievant had been drinking she had been driving the vehicle. She had pulled over and was sleeping when S████ arrived. S████ asked if everything was ok and then got out of his vehicle. K████ assumed that S████ was one of the Grievant’s friends. The Grievant was lying back in his seat when S████ walked over to the Grievant’s side of the car and asked him to keep his hands up.

According to K████, S████ then drew his gun at which time she stated several times that the Grievant “was a cop.” The Grievant was trying to figure out what was going on and S████ told the Grievant that “if he was a cop he ought to know the protocol.” K████ testified that the Grievant was trying to get his ID out

when S██████ saw the gun and told the Grievant to put his hands up. She added that the Grievant was cursing at S██████, especially when S██████ would not give the Grievant an opportunity to get his ID out. On cross-examination, K█████ stated that the Grievant did not produce his ID while he was in the vehicle, but that he was attempting to do so. She testified further that the Grievant kept saying to S██████ he was “going to show you I’m a cop.”

The Grievant testified that he had been drinking at a party with K█████ and that K█████ (who was not drinking) drove the vehicle and parked in front of her house. They were talking and fell asleep. The Grievant averred that he had his gun on his lap because it was a dangerous neighborhood. He was awoken by a bright light in his face and being told to put his hands up. As K█████ was telling S██████ that the Grievant was a cop, the Grievant was trying to bring his seat up and retrieve his wallet. According to the Grievant, he told S██████ he was a police officer. Then J██████ arrived, who informed S██████ that “that’s Turk.” The Grievant stated that up until this point he had not used any profanity.

The Grievant testified further that Shipanga then “forcibly” removed him from the vehicle. S██████ then grabbed the Grievant’s gun off of the floor of the car. He then “forced” the Grievant to the back of the car. The Grievant told S██████ to get off of him and asked him “why he was twisting my arm. I’m a cop.” When S██████ told the Grievant to put his hands on the car, the Grievant asked him why he had to do so, since he was a cop and had not committed any

crime. S [REDACTED] then pulled out his asp. The Grievant testified that at this point he balled his fist and said: "You bitch ass nigger. I'll fuck you up and knock you down." According to the Grievant, S [REDACTED] then responded: "Go ahead, swing at me."

On cross-examination, the Grievant stated that J [REDACTED] identified him for the first time after the Grievant was out of the car. When asked if he had obeyed S [REDACTED] instructions, the Grievant testified: "I suppose not. I was drinking."

DISCUSSION

The parties' positions can be briefly summarized.

The City maintains that it had just cause to discipline the Grievant for conduct unbecoming, as a result of his verbal assault on S [REDACTED] and his failure to follow written and verbal directives. The Grievant's conduct was completely inappropriate and foolish. The City asks the undersigned "to place himself in S [REDACTED] shoes" in order to understand the reasonableness of his actions. The Grievant was off-duty, sitting in a vehicle with a gun in his lap, in a dangerous neighborhood at approximately 1:45 a.m. on a Saturday night. K [REDACTED] was slumped over in the driver's seat. Under these circumstances, S [REDACTED] properly drew his weapon.

The City also contends that the Grievant failed to follow S [REDACTED] instructions to put his hands up and identify himself as a police officer. This

created a dangerous situation wherein S█████ assumed the Grievant was a civilian. When the Grievant did not freeze S█████ came dangerously close to pulling his trigger. The City also argues that transferring the Grievant out of the 35th District was appropriate due to his verbal assault on a superior officer.

The Union asserts that the City has failed to meet its heavy burden of showing that it had just cause to impose a 25-day suspension and a transfer on the Grievant. It submits that the Grievant identified himself to S█████ as a police officer early on. However, even if the Grievant did not identify himself, S█████ actions show that he overreacted. He drew his weapon even before he observed the gun in the Grievant's lap. The Union also submits that S█████ testimony was filled with discrepancies, and that he was "entrenched in his own world view" of how things progressed during the confrontation with the Grievant.

The Union also urges that the Grievant was never charged with violating the Confrontation Directive, nor was he charged with insubordination, for using profanity or for violating any rule or order. Additionally, it maintains that the Directive is primarily intended to apply when a plain clothes officer is on-duty. Additionally, the Union insists the Directive is confusing because it requires the confronted officer to remain motionless, however S█████ was directing the Grievant to put his hands up. It also does not specify *when* the confronted officer is supposed to identify himself.

The undersigned must determine whether the City had just cause to transfer the Grievant and suspend him for 25 days for conduct unbecoming when he verbally assaulted S [REDACTED] and failed to follow directives.

The facts of this case present a “perfect storm” involving a dangerous encounter between an on-duty and an off-duty officer. S [REDACTED] had just responded to a late-night complaint of gun shots fired in a dangerous area known for gun violence. The Grievant was inebriated, with a handgun in his lap, in a parked car with a female slumped over in the driver’s seat. It is undisputed that S [REDACTED] made his presence known, asked the Grievant to identify himself and directed him to put his hands up.

While the testimonies of S [REDACTED] and J [REDACTED] were not entirely consistent concerning the timing of every twist and turn during the encounter, I credit their uniform accounts that the Grievant did not verbally identify himself as a police officer. Rather, in lieu of doing so he attempted to retrieve his wallet to produce his ID. This was without question a provocative move, since S [REDACTED] had his gun drawn and pointed at the Grievant. S [REDACTED] had every reason to assume the Grievant was a civilian with a gun in plain view who was refusing to comply with his directives and was reaching for the gun. It is not an exaggeration to conclude that the Grievant is very lucky to be alive to grieve the discipline imposed by the City herein.

This flash point could have been averted had the Grievant from the outset verbally identified himself as a fellow officer and put his hands up. This is what S█████ ordered him to do, and what the Confrontation Directive requires. The Grievant failed on both counts. The Union attempts to excuse the Grievant's omissions in this regard by claiming that he was attempting to retrieve his wallet to present his ID. Without identifying himself as an officer, with a gun on his lap, this movement by the Grievant almost cost him his life.

No doubt the Grievant's focus and judgment was impacted by his being under the influence of alcohol. However, his use of alcohol cannot excuse him from following the rules that are designed to preserve his own safety. Additionally, K█████ announcement that the Grievant was a cop did not excuse his obligation to comply with S█████ orders (or the Directive).

The record also indisputably shows that the Grievant acted in an insolent, profane and inappropriate manner when he verbally assaulted S█████. Regardless of whether the Grievant engaged in this misbehavior before or after he was directed to step out of the vehicle, his actions constitute conduct unbecoming an officer. The Grievant knew S█████ was a superior officer and his racially charged comments, expressly challenging S█████ authority as sergeant, cannot be countenanced. Again, the fact that the Grievant was off-duty and under the influence of alcohol is no excuse.

The Union questions the City's charging the Grievant with "unspecified" conduct unbecoming an officer. This is a catch-all provision designed to provide the City latitude to charge officers with unspecified misconduct that does not easily fit within the other specific misconduct addressed in the Disciplinary Code. As such, it provides the City broad authority with respect to penalties ("Reprimand to Dismissal"). Although the Union correctly observes that the Grievant's misconduct here could have easily been charged as insubordination (for failure to follow orders and use of profanity), the undersigned concludes that under the facts of this case it is immaterial since the penalty must be reduced as excessive.¹

The City did not present any evidence showing how it has disciplined other officers under similar circumstances. While the Grievant's misconduct was inexcusable, and worthy of serious discipline, there was no explanation provided as to how the City arrived at the 25-day unpaid suspension and transfer penalty. Captain Riley observed that he believed a 25-day suspension was excessive. The Grievant has worked for the Department for 20 years and had only been disciplined once before in 1998. Under the totality of these circumstances, meting out a ten-day suspension for conduct unbecoming is more than

¹ The penalty for a first offense of failing to follow an order is a 15-30 day suspension. The penalty for using profanity towards a supervisor is also a 15-30 day suspension. Disciplinary Code. 4-§002-10; 4-§003-10. Thus, had the Grievant been charged with both of these offenses, pursuant to the Code he would have potentially been subject to a 30-60 day suspension.

appropriate, and fits comfortably within the broad penalty parameters for such “unspecified” violations.

Furthermore, there was no specific evidence presented that returning the Grievant to the 35th District would affect the morale or the efficiency of the Department. Notwithstanding, the undersigned does not want to completely ignore the City’s determination in this regard, as it may have been based on internal factors not disclosed at the hearing.

Accordingly, based on the foregoing, the grievance is sustained in part and denied in part. The City had just cause to suspend the Grievant, however the suspension shall be reduced to a ten-day suspension without pay and the City shall reimburse the Grievant accordingly. Additionally, the parties shall meet and reach an agreement on an appropriate work location for the Grievant. The undersigned will retain jurisdiction to resolve any disputes that arise over the implementation of this remedy.

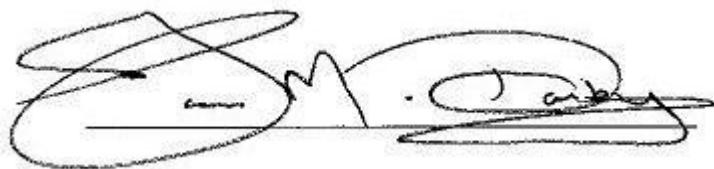
Consistent with the foregoing discussion and findings, the Arbitrator renders the following

FOP Lodge 5 and Phila.
Case No. 01-15-0003-8973
Turk Discipline
Arbitrator James M. Darby

AWARD

The grievance is sustained in part and denied in part.

The City had just cause to suspend the Grievant, however the suspension shall be reduced to a ten-day suspension without pay and the City shall reimburse the Grievant accordingly. Additionally, the parties shall meet and reach an agreement on an appropriate work location for the Grievant. The undersigned will retain jurisdiction to resolve any disputes that arise over the implementation of this remedy.

A handwritten signature in black ink, appearing to read "James M. Darby". The signature is fluid and cursive, with a large, stylized "J" and "D".

JAMES M. DARBY
Arbitrator
Lancaster, Pennsylvania
August 24, 2017